

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

JARRARD MCGARY	§	
VS.	§	CIVIL ACTION NO. 5:10cv173
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

Jarrard McGary, an inmate confined within the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed the above-styled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, for consideration pursuant to 28 U.S.C. § 636 and applicable orders of this court. The Magistrate Judge has submitted a Report and Recommendation of United States Magistrate Judge concerning this matter. The Magistrate Judge recommends the petition be dismissed without prejudice for failure to exhaust state remedies.

The Court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record and pleadings. Both parties filed objections to the Report and Recommendation.

The Court has conducted a *de novo* review of the objections. After careful consideration, the Court is of the opinion the objections are without merit. Petitioner contends he is not required to exhaust state remedies because he is proceeding pursuant to 28 U.S.C. § 2241, which has no statutory exhaustion requirement, rather than § 2254, which contains a statutory exhaustion requirement. However, as the petitioner, despite his contentions, is incarcerated pursuant to a state court judgment, he must seek relief under § 2254, which “confers jurisdiction upon the federal courts to hear collateral attacks on state court judgments.” *Wadsworth v. Johnson*, 235 F.3d 959, 961 (5th Cir. 2000). The respondent agrees that the petition should be dismissed, but objects to the failure of the Magistrate Judge to conclude that the petition is

successive. Without expressing any opinion as to whether the petition is successive, the Court agrees with the Magistrate Judge's conclusion that petitioner did not exhaust his state remedies before filing his petition. As a result, the Court need not determine whether the petition is also successive.

ORDER

Accordingly, the objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ADOPTED** as the opinion of the court. A final judgment shall be entered in accordance with the recommendation of the Magistrate Judge.

In addition, the Court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying federal habeas relief may not proceed unless a judge issues a certificate of appealability. *See* U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not demonstrate that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, the petitioner has not shown that the issue of whether he properly exhausted his state remedies before he filed the current petition is subject to debate among jurists of reason. The factual and legal questions raised by the petitioner have been consistently resolved adversely to his position and the questions presented in the petition are not worthy of encouragement to proceed further. As a result, the Court is of the opinion that a certificate of appealability shall not

issue in this matter.

SIGNED this 27th day of February, 2012.

A handwritten signature in black ink, appearing to read "David Folsom", written over a horizontal line.

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE